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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 930

JOSEPH E. MARRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals, not yet reported, is given in the record, pp. 535–540.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1926. (R. 540.) A petition for rehearing, seasonably filed and entertained, was denied January 31, 1927. (R. 541–542.) Petition for certiorari was filed February 24, 1927. Jurisdiction to issue the writ is conferred by Sec-

tion 240 (a), Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936).

QUESTIONS PRESENTED

The questions presented by this case are:

1. Were petitioner's constitutional rights as guaranteed by the Fourth and Fifth Amendments violated by the seizure, in connection with a search, seizure, and arrest, of a certain ledger and other papers and their introduction in evidence?

2. Was the testimony given by the witness Neilsen erroneously allowed in evidence, and did the instructions of the trial court pertaining thereto amount to prejudicial error?

STATEMENT OF THE CASE

Petitioner, with six others, was indicted in the District Court for the Northern District of California for conspiracy, under Section 37 of the Penal Code, to violate the National Prohibition Act by manufacturing, selling, transporting, furnishing, delivering, and possessing intoxicating liquor, and by maintaining a common nuisance by keeping for sale and selling intoxicating liquor at 1249 Polk Street, in San Francisco. (R. 3–50.)

The evidence offered by the Government centered around a saloon at 1249 Polk Street, which petitioner took over in September, 1923, from codefendant Brand, to whom he had previously loaned money to buy the business. (R. 166–168.) Petitioner continued to be the lessee and was active in

the business until the place was raided in October, 1924 (R. 90), although he and codefendant Birdsall denied petitioner's connection therewith. (R. 107, 230–232.)

While Birdsall was brought in to take charge of the saloon (R. 168), and codefendant Mahoney employed to help there (R. 150, 209), petitioner was often seen in the place and sometimes sold liquor to the customers. (R. 164, 204, 207–208, 220, 229.) He paid the rent (R. 156–157), and the telephone was listed in his name (R. 160). Water bills were sent to him (R. 192), and bills for furniture, telephone, electric light, and water made out to him were found on the premises during the raid. (R. 104, 107–108, 110.) During the period of the alleged conspiracy petitioner also made arrangements with one Neilsen to replenish his supply of liquors by bringing in liquor from rum ships in the harbor. These loads were delivered to petitioner at the dock and some time thereafter Neilsen would call at 1249 Polk Street, where he was paid for his services by petitioner. (R. 234–241.)

On October 2, 1924, the place was raided by prohibition agents (R. 90), and Birdsall, who was found in charge, was arrested (R. 98, 100). This raid was made pursuant to a valid search warrant authorizing a search of all parts of the premises for, and seizure of, intoxicating liquor and paraphernalia used in its manufacture. (R. 65–69.)

A considerable quantity of intoxicating liquor was seized (R. 75–76), and in addition thereto a book (R. 94, 98), referred to as a "gray ledger," and gas, electric, water, telephone, and furniture bills (R. 103). The ledger contained a record of the business carried on by both Brand and petitioner and showed inventories of liquors, gross receipts and expenses, including various gifts made to Police Officers Kissane and Gorham, who were indicted as coconspirators. (R. 126–131, 144–146.) A handwriting expert testified that ninety per cent of the entries in the ledger beginning with page 34 were made by petitioner. (R. 264–265, 285–286.) In the ledger were also found several loose slips of paper with items of account thereon (R. 113–115) in the handwriting of Birdsall and the auditor employed to make up statements from the ledger as to profits realized (R. 276–283, 143, 152). These papers with the ledger and the bills above referred to constitute the documentary evidence in the case.

The search was strictly within the terms of the warrant. There was no general search for incriminating documents. Those seized came under observation during a *bona fide* search for contraband. The ledger was on a shelf in a closet where a quantity of champagne was found in a trap under the floor. (R. 118, 126.) The bills were beside a cash register in the kitchen where a quantity of liquor was seized. (R. 107, 117.)

No objection was made to the seizure of the liquors under the warrant, but before trial peti-

tions were filed for the return of the ledger and other papers seized and to suppress their use in evidence, on the grounds that the affidavit and the search warrant on which it was based did not mention or describe any papers to be seized, but called for the search for and seizure of liquors and paraphernalia for their manufacture; that the ledger and other papers seized were not the instruments or fruits of crime, but were the private papers and property of petitioner; that so far as the taking of these documents was concerned the officers were unlawfully upon the property and were trespassers; that the papers were not taken from the person of petitioner, but from the premises described in the warrant; that no return was made of the papers seized nor was any receipt left therefor; and that the seizure of the papers was in violation of the Fourth Amendment and to introduce them in evidence would deprive petitioner of his rights under the Fifth Amendment. (R. 51–76.) The petitions were denied. (R. 77–78.) Objections to the introduction of the papers in evidence were made during the trial on the same grounds and were overruled. (R. 95–98, 102–103.)

Petitioner was twice tried. The first trial resulted in his conviction and that of four of his codefendants. On writs of error sued out by petitioner and three other defendants the conviction was reversed as to petitioner, because of the erroneous admission of evidence relating to liquor unlawfully seized from petitioner at 3047 California

Street and 2922 Sacramento Street, San Francisco. The seizure and admission in evidence of the ledger here complained of, after a thorough consideration of the law on the subject, was held proper. *Marron* v. *United States,* 8 F. (2d) 251.

On retrial petitioner was again convicted (R. 84) and was sentenced to two years in the Leavenworth Penitentiary and to pay a fine of $10,000 (R. 88–89). The conviction was affirmed by the Circuit Court of Appeals (R. 540), the court holding that its former decision on the admissibility of the documents in question had become the law of the case (R. 536–537).

ARGUMENT

I

THE SEIZURE OF PETITIONER'S LEDGER AND PAPERS AND THEIR INTRODUCTION IN EVIDENCE DID NOT VIOLATE THE FOURTH AND FIFTH AMENDMENTS

When the officers entered the saloon under a valid warrant for the search of contraband liquor they found Birdsall, petitioner's coconspirator, in charge. He was then actually engaged in the commission of a misdemeanor by possessing intoxicating liquor for beverage purposes and by maintaining a nuisance where such liquors were kept for sale. The officers had sufficient grounds to know that he was committing such offenses in their presence. He was in fact arrested. (R. 98, 124, 125.) As an incident to the lawful arrest the officers had

the right to search the immediate premises for fruits of the crime and the means by which it was committed (*Agnello* v. *United States,* 269 U. S. 20), and to seize evidentiary papers which were merely incidentally discovered during such search. In *Sayers* v. *United States,* 2 F. (2d) 146, relied on by the court below, it was said (p. 147):

> A lawfully arrested person may be searched for instruments, fruits, and evidences of the crime; and, if taken in commission of the crime in a building, the latter may be likewise searched to the extent that the offender's control and activities likely extended. This is the law since the Fourth Amendment, even as it was law before it, is reasonable, and is not within the amendment's ban upon unreasonable searches and seizures. * * *
>
> In any such search, not only may the instruments and fruits of crime be seized, but mere evidentiary articles, including papers incidentally discovered, may be likewise seized.

In *Smith* v. *Jerome,* 93 N. Y. Supp. 202, the officers searched the room in which defendant was arrested and found and seized certain incriminating letters. The court, in denying a motion for their return, said (p. 202):

> The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for ar-

> ticles that may be used in evidence to prove the charge on which he is arrested. We have no statute defining this power or prescribing this duty, but the ends of justice require that they should exist, and they have been exercised under the common law from time immemorial.

The language of the court in *State* v. *Mausert*, 88 N. J. L. 286, is applicable here. There the defendant, convicted of keeping a disorderly house, was arrested in the office of his hotel under a warrant and at the time of the arrest the officer seized the hotel register and cashbook which were on a near-by counter. The court, in holding that these books were properly seized and admitted in evidence against the defendant, said (p. 290):

> These books were in actual use as a means of carrying on the unlawful business, and were as much in defendant's possession and under his control when arrested as if he had them under his arm and dropped them to the floor. It is not a case where papers were secreted and intended to be kept private, nor of requiring the production of papers of like character, but rather the taking of evidence of a crime then being committed, in the commission of which the books were a useful element. There was no unreasonable search and seizure of incriminating evidence within the constitutional prohibition.

There is a recent decision on this subject, not referred to by petitioner, by the Circuit Court of Appeals for the Second Circuit, in *United States* v.

Kirschenblatt, 16 F. (2d) 202. There a warrant, as in the instant case, directed the search of premises for, and seizure of, liquor and property designed for its manufacture. The premises, consisting of offices, were entered under the warrant, the defendant was arrested in the offices, and a small amount of liquor was seized, together with a number of defendant's papers of various kinds. The Circuit Court of Appeals said that the officers' entry under the warrant and the arrest were lawful, and the question presented was the extent of the officers' authority to search and seize under the warrant, or as an incident to the arrest—that is, whether the arrest gave the officers power to ransack the premises and seize not only liquors and bottling apparatus but any incriminating papers. The court held that the warrant, which made no mention of papers, would not justify an indiscriminate seizure of incriminating documents and, with respect to the seizure as an incident to the arrest, the court drew a distinction between papers found upon the person arrested, which it held may be used in the trial so far as relevant, and papers found upon the premises of one arrested where such papers constituted merely incriminating evidence and did not fall within the class of contraband property, such as forged notes, fraudulent prospectuses, and policy slips. The court held that the papers seized did not fall within the latter class and it affirmed the decision of the District Court ordering their return.

In that case the record showed that the agents ransacked defendant's entire premises and rummaged all through his private papers for incriminating evidence, for in the course of its opinion the Circuit Court of Appeals said (p. 203):

> While we agree that strict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed. Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, *from ransacking his house for everything which may incriminate him,* once you have gained lawful entry, either by means of a search warrant or by his consent. * * *
>
> After arresting a man in his house, *to rummage at will among his papers in search of whatever will convict him,* appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. (Italics ours.)

After pointing out that papers necessary to a criminal venture may be seized, the court proceeded (p. 204):

> Yet, if all records of the offender's doings, such as account books or customers' lists, are to be included, there would seem to be no

escape from allowing a search at large through all his papers.

It is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily either communications passing between the actors or records necessary to keep track of the details. These are all that the prosecution requires, and all that, except in rare instances, it will ever get. They cannot be reached, *except by a thorough search of all that the offender has,* to allow which would be to countenance exactly what the amendment was designed to prevent. * * *

The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon search warrant. (Italics ours.)

There are statements in that opinion which indicate that the court believed that the only incriminating papers (not contraband or instruments of the crime) which may be seized as incident to a lawful arrest are those found on the person of the man arrested, but the record in that case showed that

to disclose the incriminating documents the officers ransacked the premises in a high-handed way, not to discover contraband articles described in the warrant but merely to obtain incriminating documents, and it was for this reason that the United States made no application for certiorari to review that decision.

There was in the instant case no rummaging among defendant's papers for incriminating evidence.

Whether a search and seizure are reasonable must depend upon the facts in each particular case. At the time of the seizure in the instant case the officers were engaged in the execution of a valid warrant directing the search of the premises for intoxicating liquor and property designed for its manufacture. They had no warrant for the seizure of papers *nor was any general search made therefor.* The documents seized were *incidentally discovered* while the officers were searching for liquor. The ledger was found on a shelf in a closet where a quantity of champagne was found in a trap under the floor. (R. 118, 126.) The various bills were found around and alongside the cash register in the kitchen (R. 107), where a quantity of liquor was seized (R. 117). It does not seem reasonable that officers should, upon making an arrest, be required to close their eyes to incriminating papers lying around in this fashion, which they incidentally come across while searching in good faith for contraband articles.

As authority for its statement that papers necessary to a criminal venture may be seized, the court in the *Kirschenblatt case* cites *State* v. *Mausert, supra,* and the decision in the instant case when the case was before the court below for the first time. While the ledger in question may not have been absolutely necessary to the conduct of the conspiracy charged, it did contain a record of liquor transactions, of gifts to policemen, and of the division of profits, and it was considered important enough by the defendants to their business to have it regularly audited by an accountant.

This Court has held that evidence incidentally discovered during a lawful search may be seized and used against a defendant without violating his constitutional rights. In *Adams* v. *New York,* 192 U. S. 585, a warrant authorized a search for paraphernalia used in the game of policy. The officers seized certain policy slips which were used in the game, and also certain other papers which were received in evidence against the defendant to identify his handwriting upon the slips and to show that the papers belonged to defendant and were in the same custody as the slips. This Court held that the defendant's constitutional rights had not been invaded.

In *Weeks* v. *United States,* 232 U. S. 383, 395, this Court said that the decision in the *Adams case* was put on the ground—

> that the papers found in the execution of the search warrant, which warrant had

> a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were *incidentally seized in the lawful execution of a warrant* and not in the wrongful invasion of the home of the citizen and the unwarranted seizure of his papers and property. (Italics ours.)

The cases relied on by petitioner are not in point. They involve seizures under invalid or inadequate search warrants, comprehensive searches for and seizures of private books and papers, or exploratory searches for incriminating evidence. Petitioner relies especially on *Kirvin* v. *United States,* 5 F. (2d) 282, as showing a conflict of decisions. In that case liquors, records, and papers were seized under a warrant directing a search for "liquor and records." The affidavit asked for the seizure of all intoxicating liquors found upon the premises, "together with any books, papers, records, or documents pertaining to the sale, possession, or transportation of intoxicating liquors." The court held the seizure of the records invalid because they were not sufficiently described, nor was there sufficient probable cause shown for the issuance of the warrant. The case apparently pre-

sents an attempt to authorize an exploratory search for evidence, which could no more be countenanced under color of a warrant than without one. While the opinion contains language which would seem to disagree with the views expressed in the instant case, the principle of seizure of evidence incidentally discovered was not considered, and the facts in the two cases are so different that it can not be said that they present a conflict of decisions.

If it be the law that no incriminating documents may be seized, during a lawful search for contraband under a valid warrant and as incident to a lawful arrest, unless found on the person of the one arrested, even though they are found lying around near seized contraband articles and constitute business records of the criminal operations, then the decision below was wrong and the constitutional rights of the petitioner were infringed. If this question is open to reasonable debate, or seems unsettled under the decisions, this case fairly presents it for decision, although there was abundant proof without resort to this documentary evidence, since it was shown by other testimony that petitioner rented the premises, paid the water and telephone bills, supplied the liquor and participated in its sale. (R. 156–8, 160, 234–241, 162–4.)

II

THE TESTIMONY OF WITNESS NEILSEN WAS ADMISSIBLE AND THE COURT'S INSTRUCTION THEREON WAS PROPER AND DID NOT PREJUDICE PETITIONER

Petitioner further contends that the testimony of witness Neilsen disclosed a conspiracy other than the one charged in the indictment, and that his testimony was therefore erroneously admitted in evidence, and that the court's instruction thereon was prejudicial.

Neilsen testified that he called at 1249 Polk Street, the premises in question, and, after buying a drink, received an order from petitioner to go out to the rum ship *Malahat* for a load of liquor. He did go out and brought back about one hundred cases of Scotch whiskey which was landed at Mission Rock. A day or two thereafter he was paid $300 for landing the liquor by petitioner at 1249 Polk Street. (R. 232–238.) Later Neilsen made two more trips, during one of which his boat was swamped and the liquor lost, but for landing the other load he was paid $450 by petitioner at the same address. (R. 238–241.) During one of the trips petitioner met Neilsen on the shore, where Neilsen also saw a truck. (R. 240.) This testimony obviously was relevant as showing the source from which the stock of liquor sold at the saloon conducted by the conspirators was replenished, as

ll as showing petitioner's participation in the nspiracy, and his contention that the testimony owed a separate and independent conspiracy is thout merit.

The instruction complained of was to the effect at if the Government had proved one or more of e overt acts charged in the indictment, it might rove any other overt acts by the conspirators med, or with unnamed conspirators, in furtherce of the object of the conspiracy; and in this nnection the court charged that if the Governent had proved one of the overt acts, the jury ight consider the testimony of Neilsen in deterining whether or not a conspiracy as charged in e indictment was established. (R. 305–306.) his instruction was proper and is not in conflict, s petitioner contends, with the decision in *Terry United States*, 7 F. (2d) 28, where the instruon condemned was to the effect that the jury ight convict the defendant of a crime not charged the indictment.

Moreover, there was ample evidence to sustain he conviction without Neilsen's testimony. As etitioner shows (Petition, pp. 2–3; Brief, p. 60), e was convicted by one jury without such testiony.

CONCLUSION

It is respectfully submitted that petitioner has hown no adequate grounds for the issuance of a

writ of certiorari, and the petition should therefore be denied.

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MARCH, 1927.

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